RECORD AND BRIEFS

Nos. 13-354 & 13-356

Supreme Court, U.S.
FILED
JAN 28 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, Secretary of Health and Human Services, *et al.*,

Petitioners,

—v.—

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

—v.—

KATHLEEN SEBELIUS, Secretary of Health and Human Services, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF THE GOVERNMENT

BURT NEUBORNE
Counsel of Record
NORMAN DORSEN
HELEN HERSHKOFF
40 Washington Square South
New York, New York 10011
212-620-0559
burt.neuborne@nyu.edu

WENDY R. WEISER
HOONPYO (CHISUN) LEE
BRENT FERGUSON
DAVID W. EARLEY
BRENNAN CENTER FOR JUSTICE
AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013

Attorneys for Amicus Curiae

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QUESTION PRESENTED

Are for-profit business corporations owned by religious shareholders entitled to a religiously-based exemption from employee health insurance obligations imposed by the Affordable Care Act on employers of 50 or more persons?

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. The Brennan Center seeks to draw on the abilities of scholars and practitioners to forge solutions to social and political issues that lie at the core of Justice Brennan's constitutional jurisprudence.

The consolidated cases before the Court pose important questions concerning the interpretation of the Free Exercise Clause and its interrelationship with the Establishment Clause. In the hope that it will be of assistance in analyzing the complex issues before the Court, the Brennan Center respectfully submits the annexed brief *amicus curiae*.[1]

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[1] The parties in 13-356 have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. Petitioners in 13-354 have also filed a blanket letter of consent. A letter of consent to the filing of this *amicus* brief from Respondents in 13-354 has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the preparation or the submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

1. For-profit business corporations are legal abstractions incapable of experiencing or exercising the intensely personal emotions associated with religious worship. Accordingly, they are not entitled to a religious exemption under the Free Exercise Clause from a congressionally-imposed duty to provide their employees with economic benefits.

2. Respect for the important legal construct of "corporate separateness" precludes religious shareholders of for-profit business corporations from selectively ignoring corporate separateness for religious purposes, while simultaneously deriving substantial benefits from corporate separateness in economic and regulatory settings.

3. Even if for-profit business corporations were entitled to assert claims to religious exemption under the Free Exercise Clause, this Court has never recognized a religious exemption from an otherwise valid legal duty when its exercise would impose substantial burdens on third parties.

4. Enforcement of a right to a religious exemption that imposes substantial burdens on non-believers would violate the Establishment Clause.

ARGUMENT

I.

A FOR-PROFIT BUSINESS CORPORATION IS INCAPABLE OF "FREELY EXERCISING" RELIGION WITHIN THE MEANING OF THE FIRST AMENDMENT

The challengers[2] in these consolidated cases argue that for-profit business corporations owned by religious shareholders are constitutionally entitled to a religiously-based exemption from an otherwise valid duty imposed by the Affordable Care Act to provide certain insurance benefits to their employees. The challengers seek to establish a one-way legal regime that: (1) insulates for-profit shareholders from economic liability and government regulatory power by insisting upon the separate legal existence of a corporation; but (2) ignores a corporation's separate legal existence when religious shareholders wish to merge themselves with the corporation for personal reasons.

Challengers seek to justify such a one-way corporate legal mirror on constitutional and

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[2] *Amicus* refers to the individual and corporate petitioners in *Conestoga Wood Specialties Corp.* and the individual and corporate respondents in *Hobby Lobby Stores, Inc.* as "the challengers," reflecting their common objection to the failure of the Affordable Care Act to afford them a religiously-based exemption from certain legal duties of a for-profit business corporation employing 50 or more persons.

statutory grounds.[3] They support their demand for constitutional relief:

(1) by analogy to the ability of for-profit business corporations to invoke free speech protection under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens United v. FEC*, 558 U.S. 310 (2010);

(2) as a logical consequence of the decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), to permit a non-profit "grassroots" corporation to assert the free speech rights of the individuals who constitute the non-profit entity; and

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[3] Challengers assert protection under the Religious Freedom Restoration Act ("RFRA"), arguing that the term "person" in RFRA, by reference to the Dictionary Act, authorizes for-profit corporations to seek "strict scrutiny" protection for their religious observances. However, while the Dictionary Act presumptively equates "persons" with "corporations," it does so only "unless the context indicates otherwise." 1 U.S.C. § 1. Here, where the "context" involves a question of religious observance, the "context" precludes equating "persons" with "corporations" unless and until it is known whether for-profit corporations are legally capable of asserting claims to religious freedom. See *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-09 (1993) (declining to treat association of prisoners as a "person" under the Dictionary Act, because the "context" required performance of acts requiring human characteristics). Whether "the context indicates otherwise" thus turns on whether a corporation is capable of asserting a claim of religious conscience. In short, the challengers' argument under RFRA begs the essential question raised by this litigation.

(3) with a claim that statutory exemptions in the Affordable Care Act for non-profit religious organizations, coupled with a transitional exemption for certain pre-existing grandfathered insurance plans, and a decision to confine the statute's obligations to employers with 50 or more employees, render it unconstitutional to enforce the statute against for-profit business corporations employing 50 or more employees owned by religious shareholders.

None of the arguments in favor of recognizing corporate free exercise of religion is persuasive.

A.

The Rationale Underlying this Court's Recognition of Corporate Free Speech Protection Cannot Be Extended to Support Corporate Free Exercise Claims

In support of their argument that for-profit business corporations may assert First Amendment claims sounding in the free exercise of religion, the challengers seek to draw an analogy to this Court's decisions recognizing the ability of business corporations to assert constitutional rights, especially First Amendment claims sounding in the free speech and free press clauses. *Bellotti*, 435 U.S. 765; *Citizens United*, 558 U.S. 310; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (striking down ban on pharmacists advertising drug prices); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring

proof of actual malice to hold a newspaper liable for libel of a public official).

The bulk of the Court's cases recognizing the ability of corporations to assert constitutional claims provide no support for the challengers' proposed analogy, because they protect economic rather than dignitary interests. The triumph of the business corporation in the United States and Great Britain during the 19th Century is one of the great success stories of economic history. Since the very purpose of recognizing a business corporation as a separate legal entity with unlimited life, limited liability, entity-shielding, and negotiability of ownership was to provide an efficient means of aggregating and exploiting investment capital, it made perfect sense to insulate the pool of capital invested in corporate form from improper government regulation by permitting corporations to raise Due Process, Takings, and Equal Protection claims against improper government regulation. *See, e.g., Cnty. of Santa Clara v. S. Pac. R.R.*, 118 U.S. 394, 396, 409-10 (1886) (Equal Protection); *Stone v. Farmers' Loan & Trust Co. (Railroad Commission Cases)*, 116 U.S. 307, 331 (1886) (Takings); *Smyth v. Ames*, 169 U.S. 466, 526 (1898) (Due Process), *overruled on other grounds by Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942).[4]

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[4] *See generally* Henry Hansmann et al., *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333 (2006); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416 (1989); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593 (1988).

Such a functionally defensible application of constitutional law to corporations as distinct legal entities does not, however, justify expanding corporate constitutional protection into non-economic areas where constitutional rights flow, not from concern with economic efficiency, but from respect for human dignity. Recognizing the distinction, this Court has refused to afford corporations constitutional protection under the self-incrimination clause of the Fifth Amendment, precisely because the privilege against self-incrimination is rooted, not in efficiency, but rather in respect for human dignity. *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (declining to recognize corporate privilege against self-incrimination); *Wilson v. United States*, 221 U.S. 361, 380-86 (1911) (same); *United States v. White*, 322 U.S. 694, 698-704 (1944) (declining to recognize unincorporated labor union privilege against self-incrimination); *Braswell v. United States*, 487 U.S. 99, 105, 116, 117-18 (1988) (reaffirming *Hale v. Henkel* and applying it to a single shareholder corporation).

The privilege against self-incrimination initially evolved as a protection of religious conscience, shielding individuals from being subjected to a "test oath" that would force them to choose between adherence to their religious beliefs and avoidance of serious criminal sanctions including death. *See* Leonard Levy, The Origins of the Fifth Amendment 1-5 (1968). Thus, a corporate entity that, under *Hale* and *Braswell*, lacks the attributes of human dignity

needed to assert the privilege against self-incrimination, cannot possibly be thought to possess the dignitary right to freely exercise religion.

The challengers argue, despite *Hale*, that since business corporations may assert First Amendment dignitary interests sounding in the free speech clause, *Bellotti*, 435 U.S. 765; *Citizens United*, 558 U.S. 310, they necessarily must be entitled to assert First Amendment claims sounding in freedom of religion. But such an argument ignores this Court's unbroken rationale for permitting corporations to assert free speech rights. None of the Court's decisions addressing corporate political spending endowed corporations with the dignitary status needed to anchor a free speech right. Instead, the Court has been careful to locate the source of the First Amendment right in third-party hearers, because "[p]olitical speech is indispensable to decisionmaking in a democracy." *Citizens United*, 558 U.S. at 349, 354 (citations omitted); *Bellotti*, 435 U.S. at 783; *Va. State Bd. of Pharmacy*, 425 U.S. at 756.[5]

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[5] In *N.Y. Times Co. v. Sullivan* and its progeny, the corporation's free speech rights arose under the Free Press Clause, with its intimate connection with the interests of hearers. *See N.Y. Times Co. v. Sullivan*, 376 U.S. at 269-70. The Court's commercial speech jurisprudence is overtly hearer-centered, both in inception and application. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366-67 (2002); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

Bellotti first established the legal framework for analyzing speech interests in the context of corporate political spending, instructing courts to ask not whether corporations themselves have First Amendment rights, but rather whether the First Amendment was meant to protect the delivery of the speech in question to others. 435 U.S. at 775-77. The *Bellotti* Court focused on the value of the speech in question to the voting public, not on any corporation's right to express itself. The Court acted "to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 783.

Citizens United followed suit, purporting to protect against "the loss for democratic processes resulting from the restrictions upon free and full public discussion." 558 U.S. at 344 (citation omitted). The *Citizens United* Court drew this democratic-process rationale from the Federalist Papers, concluding that "[f]actions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false." *Id.* at 355 (citation omitted). In overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court opined that *Austin*'s holding "interfere[d] with the 'open marketplace' of ideas protected by the First Amendment." 558 U.S. at 354 (citation omitted).[6]

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[6] *See also* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 158 (2010) (stating that the *Citizens United* opinion "views free speech as a system

Unlike cases involving individual free speech rights, neither *Citizens United* nor *Bellotti* discussed the "individual dignity and choice" that underlies the personal right to self-expression. *Cohen v. California*, 403 U.S. 15, 24 (1971). Rather, the Court's corporate political speech decisions focused squarely on the First Amendment interests of the hearer.

It is impossible to transfer such a hearer-centered rationale to the intensely personal world of religious conscience. As with the privilege against self-incrimination, constitutional protection of religious conscience is rooted in the heart, mind, and soul of the believer, not in some third party who is allegedly benefitted by the believer's religious observance. Thus, even if this Court was correct in effectively expanding *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965)—which permitted hearers to assert an independent First Amendment right to know—to settings where corporations rely derivatively on a hearer's right to know information that is assumed to be of use to a hearer, and unavailable without the corporate speaker,[7] such a

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involving the free flow of information rather than as a set of rights possessed by individual speakers").

[7] In *Bellotti*, in the context of a referendum without opposing candidates, this Court justified permitting a business corporation to borrow the First Amendment rights of hearers by speculating that potential voters likely would not receive a full spectrum of information without corporate participation. *Amicus*'s reliance on the reasoning of *Citizens United* and its dictum applying *Bellotti* to contested elections, for purposes of

rationale cannot support a corporate free exercise claim. When the Court protects religious conscience (or the privilege against self-incrimination), there are no third parties upon whose rights the corporation can rely. In the absence of such a third-party anchor, for-profit business corporations, as soulless legal abstractions, simply lack the dignitary status needed to assert rights to religious toleration rooted in respect for human dignity.

B.

The Statutory Exemption of Non-Profit Religious Corporations, Small Businesses, and "Grandfathered" Plans from the Requirements in Question Does Not Render the Requirements Unconstitutional as to the Challengers

All corporations are not created equal and endowed by their Creator with certain inalienable rights. The statutory exemption from the challenged requirements for non-profit religious corporations merely tracks the special associational interests this Court has long accorded non-profit corporations formed to pursue religious or social purposes. The Court has recognized that the non-profit corporate form often functions as nothing more than a useful device to facilitate the ability of individual members to associate together to advance commonly-held

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distinguishing the instant challenge, does not amount to an endorsement of that untested assumption.

political or social ideals.[8] In such settings, the Court has recognized that the First Amendment rights of individuals who have joined together in political or social association may be asserted in the name of the non-profit corporation.[9]

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241-42 (1986), for example, this Court permitted a grassroots non-profit corporation to assert the First Amendment rights of its members. In *Citizens United*, this Court exempted a non-profit corporation formed to advance political ideas from the reach of the McCain-Feingold Act. 558 U.S. at 393-94 (Stevens, J., concurring in part and dissenting in part) ("Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case."); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 480-81 (2007) (upholding right of non-profit corporation to disseminate issue ads); *Citizens Against Rent*

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[8] Historically, different categories of corporations have been accorded different legal attributes, depending upon their social function. *See generally* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655 (1926). Dewey suggests that the divergence between the treatment of for-profit business and non-profit, eleemosynary corporations may date from Pope Innocent IV's (1243-1254) conception of ecclesiastical corporations. *Id.* at 665-69.

[9] Unlike for shareholders of a for-profit business corporation, the principal benefit to members of such non-profit ideological or religious corporations is increased efficacy in the advancement of their ideals.

Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (invalidating contribution limit imposed on unincorporated association opposing ballot measure); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463-66 (1958) (upholding out-of-state non-profit corporation's right to resist demand for membership lists).

In this case, Congress has responded to such a constitutional tradition by exempting non-profit religious corporations from the insurance requirements at issue, viewing certain non-profit religious institutions as proxies for individuals associated together for religious purposes. But the decision to treat non-profit corporations as associations of individuals who have banded together to advance political or social ideals neither requires, nor justifies, identical treatment of the shareholders of for-profit business corporations.

In order to enable the economic efficiencies promised by the for-profit business corporation, this Court has deemed it necessary to erect and maintain a wall of legal separation between the corporation and its shareholders. For example, in *Daimler AG v. Bauman*, __ U.S. __, No. 11-965, 2014 WL 113486, at *4, *10 (Jan. 14, 2014), this Court declined to recognize general jurisdiction over a wholly-owned corporate subsidiary as the equivalent of general jurisdiction over the corporate parent.[10] It matters

[10] The *Bauman* Court left open the prospect that specific jurisdiction could be imposed by treating a wholly-owned subsidiary as the agent of the parent for the purpose of claims

little whether the for-profit business corporation is a large, multi-shareholder entity or a closely-held family corporation. In both settings, shareholders reap significant economic and regulatory benefits from the legal abstraction of separate corporate status, such as unlimited corporate life; limited liability; entity-shielding; negotiability of ownership; and the power to avoid regulation by a particular sovereign. Having derived substantial economic benefits by treating business corporations as freestanding legal constructs, religious shareholders such as the challengers may not elect to ignore the legal construct when it suits their personal preference. They cannot have it both ways.

The challengers further argue that the combined effect of exempting non-profit religious corporations, small businesses with fewer than 50 employees, and "grandfathered" plans already in place when the law went into effect (as long as they remain unchanged), demonstrates that it is unnecessary to burden for-profit corporations with 50 or more employees with a duty to engage in activity deemed immoral by religious shareholders.

The short answer to this argument is that, it wrongly presupposes that for-profit business corporations (or their religious shareholders) are entitled to invoke the highly protective jurisprudence of free exercise strict scrutiny on behalf of the corporation. In the absence of such an antecedent

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related to the forum. *See id.* at *10. But the Court never even considered ignoring the principle of corporate separateness.

finding by this Court, the corporate challengers are entitled to the far less searching "rational basis" protection of the implied Equal Protection provisions of the Fifth Amendment. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-89 (1955); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). The challengers do not seriously dispute that Congress acted rationally to exempt small businesses as a matter of economic necessity, and to authorize transitional "grandfather clause" exemptions as a matter of administrative necessity.

II.

THE FREE EXERCISE CLAUSE DOES NOT ENCOMPASS A CONSTITUTIONAL RIGHT TO SHIFT THE SUBSTANTIAL COSTS OF RELIGIOUS OBSERVANCE TO THIRD PARTIES

On a more profound level, the challengers are not entitled to a religiously-based exemption even if they possess the legal capacity to demand one. This Court has never granted a believer a religiously-based exemption from an otherwise valid legal duty when the grant of such an exemption would impose significant costs on third parties.

A.

The Free Exercise Clause Does Not Entitle a Believer to Impose Substantial Costs on Third Parties

Zechariah Chafee once observed that the right to swing your fist ends at the other fellow's nose. Zechariah Chafee, Jr., *Free Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919). Nowhere is this aphorism truer than in this Court's free exercise jurisprudence.

Where recognition of a religiously-based exemption from an otherwise valid legal duty would not impose substantial costs on third parties, this Court has forged a proud heritage of constitutionally-mandated religious tolerance. *See W. Va. State Bd.*

of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (recognizing religiously-based exemption from duty to salute the flag);[11] *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (recognizing religiously-based exemption from conditions for receipt of unemployment compensation in the absence of proof of substantial third-party costs); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 719-20 (1983) (same); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987) (same).

Where, however, as here, judicial enforcement of a religiously-based exemption would impose substantial costs on third parties, this Court has uniformly denied a free exercise claim. For instance, in denying a free exercise exemption sought by Jehovah's Witnesses from a child labor law, the Court explained that "[t]he right to practice religion freely does not include liberty to expose the . . . child to . . . ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). More recently the Court denied a free exercise exception from tax exemption rules, because to grant it would have endangered the public fisc: "[E]ven a substantial burden [on religious exercise] would be justified by the broad public interest in maintaining a sound tax system."

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[11] *Barnette* is, of course, an important free speech case as well, recognizing that the demands of secular conscience may be as compelling as the commands of religious conscience. *See also United States v. Seeger*, 380 U.S. 163, 176 (1965) (upholding conscientious objectors' exception from draft based on secular conscience); *Welsh v. United States*, 398 U.S. 333, 339-40 (1970) (same).

Hernandez v. Comm'r, 490 U.S. 680, 699-700 (1989) (citation omitted); *see also Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (denying religiously-based exemption from ban on bigamy); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934) (denying religiously-based exemption from military obligations); *United States v. Macintosh*, 283 U.S. 605, 623-24 (1931) (same), *overruled on other grounds by Girouard v. United States*, 328 U.S. 61, 63 (1946); *Gillette v. United States*, 401 U.S. 437, 461-63 (1971) (same); *United States v. Lee*, 455 U.S. 252, 260-61 (1982) (denying religiously-based exemption from payment of Social Security taxes); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (denying religiously-based exemption from anti-discrimination norms); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (denying religiously-based exemption from minimum wage and recordkeeping rules imposed by Fair Labor Standards Act); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-92 (1990) (denying religiously-based exemption from payment of sales taxes).[12]

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[12] In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990), the Court declined to grant a religiously-based exemption from drug laws for the use of peyote in Native American religious ceremonies. The majority reasoned that it was unnecessary to conduct a meaningful inquiry into third-party costs because the interference with religious observance was not "intentional." One could make a similar argument here. *Amicus* believes, however, that *Smith* was an unfortunate departure from the Court's traditional protection of religious freedom absent knowledge of a significant third-party cost. In *Gonzales v. O Centro Espirita*

Our commitment to religious freedom does not stop, however, with judicially enforceable constitutional rights. Where judicial enforcement of a claimed constitutionally-mandated free exercise *right* is barred because it would shift burdens to third parties, this Court has recognized a limited legislative power to advance free exercise *values*. It has upheld legislative efforts to *accommodate* the demands of religious conscience by balancing relatively insignificant costs to third parties against the demands of religious conscience. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339-40 (1987) (upholding statutory right of non-profit religious group to limit employment to church members); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, __ U.S. __, 132 S. Ct. 694, 706 (2012) (upholding "ministerial exemption" from Title VII in order to preserve the free exercise values of members of congregation); *see also Seeger*, 380 U.S. at 176 (upholding conscientious objectors' exception from draft based on secular conscience); *Welsh*, 398 U.S. at 339-40 (same). But when a so-called accommodation statute actually compelled third parties to bear substantial economic and social costs generated by religious exemptions, this Court

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Beneficente Uniao Do Vegetal, 546 U.S. 418, 423 (2006), the Court granted an exemption in a virtually identical setting under RFRA because of the lack of a demonstrated third-party cost. Unlike in *Smith* or *O Centro Espirita*, in the consolidated cases currently before the Court, grant of a religious exemption unquestionably would impose very substantial third-party costs.

has invalidated the statute as an establishment of religion. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (invalidating law mandating time-off for religious Sabbath, because law required co-workers to work on weekend); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977) (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or co-workers).

Thus, under this Court's settled free exercise jurisprudence, not only would a judicially-mandated religious exemption from the obligations of the Affordable Care Act be completely unprecedented—because it would impose substantial economic burdens on competitors and employees—but it might well violate the Establishment Clause by forcing third parties to bear the substantial economic costs of the challengers' religious observance.

B.

Free Exercise "Strict Scrutiny" is Designed to Test Whether the Grant of a Religiously-Based Exemption Would Shift Unacceptable Costs to Third Parties

Strict judicial scrutiny under the Free Exercise Clause requires the government to demonstrate a "compelling state interest" that is advanced by "the least restrictive means" in order to justify the denial of a demand for a religiously-based exemption from

an otherwise valid legal duty.[13] *Thomas*, 450 U.S. at 718; *see also Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972). In a free exercise setting, application of the strict scrutiny formula has always turned on whether grant of a religious exemption would shift a substantial burden to others. While this Court formally applied the elements of strict scrutiny in a free exercise setting for the first time in *Sherbert v. Verner*, 374 U.S. at 406-07, to search for third-party costs, it had applied the substance of the inquiry for nearly a century. In case after case, the Court denied free exercise exemptions where substantial costs imposed by a particular religious observance would be borne by third parties, but granted religious exemptions when *no* substantial cost would be borne by a third party. For example in *Reynolds*, 98 U.S. 145, the Court denied the request of a Mormon for a religiously-based exemption from territorial laws criminalizing bigamous marriage. The Court reasoned that society had an important interest in protecting vulnerable women forced into plural marriage, and that the grant of a religious exemption would force women and children to bear the costs of

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[13] Strict judicial scrutiny is also applied by this Court in certain equal protection contexts involving discrete and insular minorities and the selective apportionment of "fundamental rights," as well as free speech settings involving efforts to censor "pure" speech. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (applying strict scrutiny to racial classification); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying strict scrutiny to regulation of content of speech); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (applying strict scrutiny to voting restriction).

the husband's religious observance. 98 U.S. at 164-68. In *Hamilton*, 293 U.S. at 265, and *Macintosh*, 283 U.S. at 623-26, the Court rejected demands for constitutionally-mandated religious exemptions from democratically-defined military obligations.[14] The two cases were reaffirmed subsequent to *Sherbert* in *Gillette*, which rejected a free exercise claim to decline to serve in an "unjust war" because to grant it would force third parties to bear the burden of serving instead. 401 U.S. at 461-63.

On the other hand, where granting a religiously-based exemption would impose *de minimis* or no costs on others, the pre-*Sherbert* Court recognized religiously-based claims to exemption. Memorably, in *Barnette*, the Court exempted a Jehovah's Witness child from compulsory flag salutes in school. 319 U.S. at 642. The difference between *Barnette* and the case that it overruled, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), was the *Barnette* Court's realization that exempting religious schoolchildren from compulsory flag salutes imposes little or no cost on anyone else. *Barnette*, 319 U.S. at 640-42.

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[14] *Hamilton* arose out of California's requirement that students attending Land Grant colleges enroll in military training courses. The Court analyzed the case under the "liberty" provision of the Due Process Clause because the Free Exercise Clause had not yet been clearly applied to the states. *Macintosh* involved a religiously-based reluctance to take the oath of naturalization promising to defend the nation by force of arms. The Court overruled *Macintosh* in *Girouard* after reinterpreting the relevant statute. 328 U.S. at 63.

In *Sherbert* itself, the birthplace of the current strict scrutiny formula, the idea of a "compelling" interest was deployed to require South Carolina to demonstrate that granting the religious exemption at issue would, in fact, impose substantial costs on others. When South Carolina failed to do so, the exemption was granted. 374 U.S. at 406-09.

In the years since *Sherbert,* free exercise strict scrutiny has operated to require government to identify a substantial third-party cost that would be imposed by granting a religiously-based exemption. Often, as in the aforementioned cases denying religious exemptions from bigamy laws, payment of Social Security taxes, anti-discrimination requirements, protective labor laws, military obligations, and child welfare duties, the third parties who would bear the costs of a religious exemption are readily identifiable. Occasionally, as in cases like *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (denying a religious exemption from indoor military headgear regulations); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (denying religiously-based work exemptions in prison settings); and *Bowen v. Roy*, 476 U.S. 693, 709-12 (1986) (denying a religious exemption from the use of Social Security numbers as identifying criteria), the third-party costs are more difficult to associate with known individuals, and are expressed by the Court as risks to the efficient and safe administration of government programs affecting a wide array of unknown individuals. But whether the third parties who would bear the costs of a religious exemption

are identifiable individuals or unknown victims of an administrative breakdown, government demonstrates a "compelling" interest in denying a religiously-based exemption by showing that granting the exemption would substantially risk imposing significant costs on third parties.

The second half of the strict scrutiny test, requiring that the challenged law represent the least restrictive means of achieving the government's goal, obliges the government to demonstrate that any infringement on religious exercise cannot be minimized without significant cost to third parties. *Thomas*, 450 U.S. at 718; *see also Yoder*, 406 U.S. at 214-15.

In this case, the government's denial of the challengers' demand for a religiously-based exemption clearly satisfies free exercise strict scrutiny. Granting a religiously-based exemption from the health insurance provisions of the Affordable Care Act would impose significant costs on at least two categories of third parties—non-religious competitors, who would be placed at an economic disadvantage by being forced to incur the full cost of employee health insurance; and the challengers' employees, who would be deprived of valuable employment benefits important for their health. In fact, the third-party costs that would be imposed by a religious exemption from the health insurance obligation imposed by the Affordable Care Act are analytically identical to the costs that justified denials of religious exemptions in *Lee*, 455

U.S. at 260-61 (denying religiously-based exemption from payment of Social Security taxes); *Bob Jones University*, 461 U.S. at 602-04 (denying religiously-based exemption from anti-discrimination norms); *Alamo Foundation*, 471 U.S. at 303 (denying religiously-based exemption from minimum wage and recordkeeping rules imposed by Fair Labor Standards Act); and *Jimmy Swaggart Ministries*, 493 U.S. at 389-92 (denying religiously-based exemption from payment of sales taxes).

Moreover, short of subsidizing the exemption with taxpayer funds (a technique that was rejected in *Lee*, *Alamo Foundation*, *Hernandez*, and *Jimmy Swaggart Ministries* and that would risk violating the Establishment Clause by requiring taxpayer support of religion) or forcing insurance companies or competing employers to bear additional costs, no less restrictive means exist to avoid asking third parties to bear the substantial cost of the religiously-based exemption that the challengers seek.

It is no answer to point to the relatively minor cost of granting a religiously-based exemption to a single challenger. Once such a for-profit corporate exemption is granted to one believer, it must be granted to all. Indeed, once granted for purely religious reasons, a similar exemption would be granted to employers with similarly intense non-theological conscientious scruples. *Seeger*, 380 U.S. at 176 (recognizing statutory conscientious exception from draft based on non-theological beliefs); *Welsh*, 398 U.S. at 339-40 (same).

C.

The Statutory Grant of Certain Exemptions Does Not Serve to Diminish the Government's Interest in the Challenged Requirements or Undercut Congress's Choice of Means

The challengers argue that if providing health insurance coverage really were "compelling," as that term is used in the strict scrutiny inquiry, Congress never would have limited coverage to employers with 50 or more employees; would not have exempted certain non-profit religious employers; and would not have temporarily exempted certain "grandfathered" pre-existing insurance plans. But such an argument misunderstands the meaning of the "compelling interest" concept as it is used in the free exercise strict scrutiny formulation.

It is not for this Court to decide whether assuring health insurance coverage for employees is truly a compelling government obligation. In a democracy, that decision is for the people through their elected representatives. As uniformly applied in this Court's free exercise jurisprudence to date, the government's "compelling interest" has not been tested by a case-by-case judicial inquest into the relative importance of a given government program, but by the need to prevent the imposition of substantial costs associated with a religious exemption on third parties. Since, in this case, substantial costs would unquestionably be borne by the challengers' competitors and employees,

no doubt exists concerning the "compelling" nature of the government's interest in denying a religious exemption that would impose substantial costs on third parties.

Moreover, even if one were to accept the challengers' invitation to treat the existing exemptions as evidence that the government itself does not view health insurance coverage as truly "compelling," the argument fails because the exemptions support no such inference. The exemption for non-profit religious employers engaged in religious activities may well be required by the Free Exercise Clause. At a minimum, it reflects Congress's desire to accommodate the free exercise values of non-profit religious entities engaged in religious activities. It cannot be the law that if Congress grants such an accommodation to non-profit religious entities, it must also exempt for-profit business corporations owned by religious shareholders, or by shareholders motivated by similarly intense non-theological objections. Taken seriously, the challengers' argument would require the existing grant of religious exemptions from the reach of Title VII to be extended to for-profit business corporations owned by religious shareholders. *Corp. of the Presiding Bishop*, 483 U.S. at 339-40 (upholding statutory right of non-profit religious group to limit employment to church members); *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 706 (upholding "ministerial exemption" from Title VII in order to preserve the free exercise values of members of

congregation); *see also Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (denying religiously-based constitutional exemption from restriction on use of government scholarship funds, but acknowledging power to provide state law exemption).

The challengers' effort to parlay the grant of exemptions to certain non-profit religious entities into a general exemption for for-profit business corporations owned by religious shareholders misunderstands the tripartite nature of this Court's free exercise jurisprudence. Where the grant of a religiously-based exemption would impose substantial costs on third parties, this Court has uniformly refused to recognize a judicially-enforced constitutional right to a religious exemption. But where government regulation impinges on religious values, the Court has recognized a legislative (as opposed to judicial) power to accommodate the exercise of religious values by providing religious exemptions in particularly compelling circumstances when the cost to third parties is relatively minor. But even such a power is limited if it shifts onerous costs to third parties. *Estate of Thornton*, 472 U.S. at 709-10 (invalidating law mandating time off for religious Sabbath because law operated to require co-workers to work on weekend); *Trans World Airlines, Inc.*, 432 U.S. at 84-85 (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or co-workers). Ironically, therefore, if the challengers' claim is correct that the grant of limited exemptions to non-profit religious entities automatically entitles

for-profit corporations owned by religious shareholders to a similar exemption, it would render it impossible for legislatures to provide limited exemptions designed to accommodate religious values without setting off an inexorable expansion of the exemption that would violate the Establishment Clause.

Nor can the challengers argue that the decision to provide a temporary exemption to pre-existing "grandfathered" health insurance plans demonstrates the non-compelling nature of health insurance coverage. The administratively sensible decision to phase in a massive program altering the health care structure of the nation by temporarily exempting certain pre-existing insurance plans during the transitional period proves no such thing. Nor does Congress's decision to limit the health insurance mandate to employers with 50 or more employees. A judgment about the ability of small businesses to bear the economic costs of a government program has little or nothing to do with its compelling nature. It speaks to economic necessity and tragic choices, not the importance of health insurance.

Finally, the challengers' suggestion that extending already existing exemptions to for-profit business corporations is the "least restrictive means" misunderstands the role of "least restrictive means" within this Court's free exercise jurisprudence. In a free exercise context, the "least restrictive means" element requires the government to demonstrate the

absence of practicable alternatives that would avoid infringing on religious exercise without imposing significant costs on third parties. If such readily-available mechanisms exist, respect for principles of religious tolerance requires the government to utilize them as the "least restrictive means" of avoiding the imposition of unfair costs on third parties. But no such mechanisms exist in this case. Expanding existing exemptions to for-profit business corporations owned by religious shareholders would not avoid the imposition of unfair costs on third parties; it would exacerbate them. Either the employees would bear the additional costs of losing insurance coverage, or the costs of supplying the insurance would be shifted to insurance companies or to the public fisc.

Thus, as long as the existing administrative and economic exemptions are justified by substantial government interests, there is no constitutional duty under the Free Exercise Clause to extend them to for-profit business corporations. Taken seriously, the challengers' conceptualization of the infinitely expandable nature of exemptions under the Free Exercise Clause would cause the fact of limited exemptions from the Social Security taxes at issue in *Lee*, the fair labor standards at issue in *Alamo Foundation*, and the sales taxes at issue in *Jimmy Swaggart Ministries* to require reversal of those bedrock cases.

III.

CONGRESS REMAINS FREE TO SEEK TO ACCOMMODATE THE CHALLENGERS' RELIGIOUS VALUES

The challengers' inability to assert a persuasive free exercise claim for exemption ends this case, but it need not end the controversy. Under this Court's tripartite jurisprudence, Congress retains the power to seek to accommodate the challengers' sincere religious scruples as long as the accommodation does not impose unfair costs on third parties. The nation's treatment of conscientious exemptions from military service provides a roadmap.

Since the grant of religiously-based conscientious exemptions from military service would have imposed a direct cost on third parties forced to serve in place of the religious objectors, this Court has repeatedly refused to recognize a free exercise-based exemption from the draft. But, since World War I, the nation's commitment to respect for individual conscience has persuaded Congress to provide a statutory substitute that respects conscience, but requires conscientious objectors to perform alternative service designed to minimize the cost to third parties. Finally, to prevent the accommodation from violating the Establishment Clause, this Court has carefully construed the Selective Service Act to provide for exemptions on the basis of non-religious conscience as well, rendering the exemptions a neutral effort to respect conscience.

It is not beyond the ability of Congress to replicate the conscientious objection model in the context of the Affordable Care Act. Free exercise-based exemptions are barred because they would shift unfair costs to third parties. But a program that freed challengers from a conscientious dilemma, while minimizing the costs to third parties, remains possible. However, under the tripartite free exercise jurisprudence of this Court, the search for an accommodation that does not shift unfair costs to third parties is the province of Congress, not this Court.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), should be reversed, and the decision of the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377 (3d Cir. 2013), should be affirmed.

Dated: January 28, 2014
New York, New York

Respectfully submitted,

BURT NEUBORNE
Counsel of Record

NORMAN DORSEN
HELEN HERSHKOFF
40 Washington Square South
New York, New York 10011
212-620-0559
burt.neuborne@nyu.edu

WENDY R. WEISER
HOONPYO (CHISUN) LEE
BRENT FERGUSON
DAVID W. EARLEY
BRENNAN CENTER FOR JUSTICE
AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas,
12th Floor
New York, New York 10013